IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 9TH OCTOBER 2007 / 17TH ASWINA 1929

CRL.A.No. 1814 of 2003()

SC.543/2000 of ADDL.SESSIONS COURT (ADHOC-I), KASARAGOD

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APPELLANT: ACCUSED:

B. ABDULLA, S/O. MOIDEEN KUNHI,
BANDIYOD, MANGALPADY VILLAGE.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: COMPLAINANT & STATE:

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1. STATION HOUSE OFFICER, KUMBLA POLICE STATION, KASARAGOD.

2. STATE OF KERALA REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.1814 OF 2003-D

Dated this the 9th day of October, 2007.

JUDGMENT

The question raised in this appeal while the counsel appearing for the appellant challenging the judgment of the trial court is that what will be criminal liability of a person who imports, transports or possesses foreign liquor in violation of the provisions of the Abkari Act or the Rules framed thereunder?

2. The short facts of the case dealt by the trial court were that the appellant was found in transporting or rather in possession of 288 bottles of AJ Fenny, Indian made foreign liquor, on 13.4.1999 at about 1.25 p.m without having any authority, permit or license under the provisions of the Abkari Act and the Rules framed thereunder. PW3 – the Sub Inspector of Police, filed a charge against the appellant under Section 55(a) of the Abkari Act (herein after referred to as the Act). To prove the charge against the appellant, prosecution though examined three witnesses, the evidence of PW3 alone was accepted by the trial court. Prosecution also relied on Exts.P1 to P5. No material objects have been

produced before the court or marked on the side of the prosecution. On closing the prosecution evidence, the appellant was also questioned under Section 313 of the Code. He denied the charge and had stated that the police arrested him from his business premises and the case was foisted against him due to the reason that he formulated a quarrel at the place of the incident. The trial court found the appellant guilty under Section 55(a) of the Act and he was convicted thereunder and sentenced to undergo R.I for three and a half years and to pay a fine of Rs. One lakh with default sentence of payment of fine, to undergo R.I for a further period of three months.

3. Prosecution examined Pws 1 and 2 to support the evidence of PW3, the Sub Inspector of Police. But, these witnesses turned hostile to the prosecution and had stated that they have not seen anything seized from the appellant. Prosecution case is that while PW3 was on duty on the day of the incident, he got information that foreign liquor is being imported to the State from Karnataka in a vehicle. On getting that information, while PW3 was waiting at a place called Seethamgoli within the limits of Kumbala Police Station noted that a Maruthi Car having Registration No.KA-04/7940 was

coming along the public road and the car was stopped. Further, it was noted by PW3 that the appellant was driving the car and at the back seat and dicky of the car contained six cardboard boxes each containing five boxes which contained AJ Fenny with the label sale in Karnataka only. According to this witness, each bottle contained 180 ml liquor and it was found verified as AJ Fenny, an Indian made foreign liquor. PW3 also found that the appellant was not having any permit to import, transport or to possess the said bottles of foreign liquor. Hence, on preparing Ext.P2 seizure mahazar, PW3 seized all the cardboard boxes each contained foreign liquor and the appellant was arrested. Subsequently, the appellant was produced before the court after registering a crime against him. Further case of the prosecution is that, two bottles of Fenny seized from the appellant were got analysed and as per Ext.P5 chemical report, it was stated that the sample contained 35.22% ethyl alcohol by volume. On the above evidence, the trial court found the appellant guilty under Section 55 (a) of the Abkari Act.

4. The learned counsel appearing for the appellant though had taken so many contentions before this Court, mainly relied on the

following contentions. Firstly, it is contended that to prove the prosecution charge, there was only the evidence of PW3, the Sub Inspector of Police, as Pws 1 and 2, the two independent witnesses cited, were turned hostile to the prosecution. If so, reliance placed by the trial court on PW3 alone is not justifiable. Secondly, it is contended that there is no evidence before the court that any material object as claimed by PW3 has been either seized from the appellant or any sample has been got analysed as per the provisions of the Abkari Act as well as the provisions of the Kerala Excise Manuel. Thirdly, it is contended that even if the prosecution case is accepted, the finding of the trial court that the appellant had committed an offence punishable under Section 55 (a) of the Act is not legally tenable as the appellant had not committed any offence punishable under the provisions of Section 55(a) of the Act.

5. To answer the contentions raised by the learned counsel appearing for the appellant, firstly, this Court has to find out whether acceptance of the evidence of PW3 is correct or not. As per Ext.P2 seizure mahazar and the evidence of PW3, it was proved before the court that 288 bottles of AJ Fenny, Indian made foreign liquor, have been seized from the Maruthi Car driven by the appellant. There

is no legal bar or rule that the prosecution cannot prove its case only on the basis of the evidence of an investigating officer or an official witness, if such evidence is not tainted or suffering from any infirmity. In the above circumstances that the finding of the trial court that 288 bottles of Indian made foreign liquor have been seized from the appellant on 13.4.1999 as alleged by the prosecution, is on acceptable evidence. Further, it has to be noted that while seizing the foreign liquor bottles, two bottles were taken for analysis and as per Ext.P5 chemical report it was reported that the samples analysed were Fenny, each contained 35.22% ethyl alcohol. In this context, the learned counsel submits that the finding of the court that 288 bottles were seized from the appellant is not proved as no contraband has been produced before the court for verification. In Ext.P4 forwarding note given by the Sub Inspector, it was stated that four bottles of Fenny were taken for analysis, but as per Ext.P5, only two bottles were analysed. Apart from that infirmity, PW3 admits one fact that he had not labeled or sealed the sample taken for analysis in the presence of independent witnesses or got signed by the appellant. This fact, coupled with non- production of any of the bottles before the court for verification, creates little doubt regarding the evidence of

PW3. But, this Court had verified the entire records received from the trial court and found that there was a request made by the trial court for production of the contraband seized and by a letter, the Sub Inspector has informed that out of 288 bottles, only 229 bottles were available for production before the court. Considering that fact and as the court found that the evidence adduced by PW3 is acceptable, this Court is of the view that finding of the trial court regarding seizure of the contraband article can be accepted.

6. The next question to be considered is, on accepting the evidence of PW3 and the facts proved before the court, whether the finding of the trial court that the appellant had committed an offence punishable under Section 55(a) of the Act is legally sustainable or not. Section 55 of the Act narrates as follows:

> 55. For illegal import, etc:- Whoever in contravention of this Act or of any rule or order made under this Act.
>
> (a) imports, exports [transports, transits or possesses] liquor or any intoxicating drug; or
>
> (b) manufactures liquor or any intoxicating drug;
>
> (c) [xxx]

(d) [taps or causes to be tapped] any toddy-producing tree, or

(e) [draws or causes to be drawn] toddy from any tree; or

(f) constructs or works any [distillery, brewery, winery or other manufactory in which liquor is manufactured]; or

(g) uses, keeps or has in his possession any materials, still,m utensil, implement or apparatus whatsoever for the purpose of manufacturing liquor other than toddy or any intoxicating drug; or

(h) bottles any liquor for purposes of sale; or]

(i) [sells or stores for sale liquor] or any intoxicating drug]

[shall be punishable]

7. With the above provisions of the Act, it has to be find that whether imports, transports or even possession of foreign liquor is an offence punishable under Section 55 (a) or not. As per Section 55 (a), eight different and distinct offences are narrated. Section 55 (a) is relating to imports, exports, transports, transits or possesses liquor or any kind of intoxicating drugs. Even for attracting an offence under Section 55(a) of the Act, as per the dictum laid down by this Court in **Surendran v. Excise Inspector** (2004 (1) KLT 404),

the prosecution should allege and prove that such possession of liquor or intoxicated drug shall be in connection with any import, export, transport or transit of the same. Apart from that, the above Section only deals with liquor or intoxicated drug. If so, any liquor where the appellant had imported,r transported or possessed, cannot be punished under Section 55(a) or any other provisions of the Act. In this context, it has to be noted that, the allegation in the charge against the appellant was that, he was importing or transporting or possessing 288 bottles of Fenny, Indian made foreign liquor. Foreign liquor is defined under subsection 13 of Section 3 of the Act which reads as follows:

> (13) Foreign Liquor:- "Foreign Liquor" includes all liquor other than country liquor:
>
> Provided that in any case in which doubt may arise the Government may declare by notification what, for the purposes of this Act, shall be deemed to be "country liquor" and what "foreign liquor".

The same word foreign liquor is also defined in Rule 1 A of the Foreign Liquor Rules :

> 1A. Definition: "Foreign Liquor" in these Rules means and includes all wines, spirits, beer, cider [fenny] and other fermented liquors and [plain rectified spirit including absolute alcohol intended

> to be used for the manufacture of liquors meant for human consumption] imported into the State by sea or land or air, whether manufactured in India or outside.

8. A reading of the above provisions would clearly indicate that what would be a foreign liquor either Indian made or foreign made. Further, provisions of Section 55(a) of the Act also taken into consideration for import export, transport or possession of liquor. The facts in the case would only pertain to import, transport or possession of foreign liquor. As per Rule 9 of the Foreign Liquor Rules, the term import is also defined as follows:

> 9. Import: No foreign liquor shall be imported into the State except under a permit issued by the Officer-in-charge of the Division to which the liquor is to be imported. Such permits will be granted only on proof of payment of the excise duty if any payable to this State, except where some special arrangements exist between the State of Travancore-Cochin and the State from which the import is made for the collection of such duty. [The same procedure shall apply in regard to the clearance and transport of foreign liquor from a customs area as defined in the Customs Act, 1962 (Central Act 52 of 1962) by any licensee in Kerala State. No permit shall be issued for removal from the customs area except to the holder of licences in Forms FL1 or FL9 and unless the bill of entry or the clearance certificate issued by the customs authorities and the certificate showing the alcohol contents either issued by the distillery or by Customs Laboratory concerned is produced before the Assistant Excise Commissioner. The foreign liquor so

> imported shall be taken to stock by the licensee only after verification by the Excise Inspector in charge of the range having jurisdiction over the area of destination]

The term transport is also defined in Rule 11 of the Rules which reads as follows:

> 11. Transport: No quantity of foreign liquor in excess of [quantity notified by the Government under Section 10 and 13 of the Act] shall be transported from one place to another within the State unless the same is covered by a transport permit issued by the Excise Inspector in charge of the Range of origin. A copy of such permit shall be forwarded by the Excise Inspector concerned to the Excise Inspector in charge of the Range to which the consignment is destined. The Excise Inspector at the destination shall verify the consignment on arrival and see that the quantity is duly credited in the accounts in case the transport is by a licensee.

9. Further, as per Rule 11A, possession of foreign liquor is also restricted by the above Rules. The State Government wants to regulate import, transport , possession and sale of foreign liquor and violation of such Rules or such restrictions, can be considered as an offence punishable under the provisions of the Act other than Section 55(a). In this context, in **Mohanan v. State of Kerala**

(2007 (1) KLT 845) this Court had considered almost all the provisions of the Act and also violation of the Rules made under the Act including Foreign Liquor Rules, framed under Sections 10, 23 and 29 of the Act. In the above judgment, this Court had specifically taken the view that violation of the Rules or violation of any permit condition or license issued under the provisions of the Act can be punished only under Section 63 of the Act. So, the fact now proved before the court would show that the appellant had imported or transported or even found in possession of 288 bottles of Indian made foreign liquor in violation of the Foreign Liquor Rules. Hence a criminal liability which can be fastened on the appellant is only under Section 63 of the Act for violation of the Rules.

10. In the light of the above provisions of law and the facts proved, this Court is of the view that finding of the trial court that the appellant had committed an offence under Section 55(a) of the Act is not legally sustainable instead he is found guilty under Section 63 of the Act for violating the Foreign Liquor Rules while importing or transporting Indian made foreign Liquor not in accordance with the regulations and the restrictions contained in the Rules.

11. The next question to be considered is what would be the punishment awarded against the appellant? The prosecution case is that the appellant was found importing and transporting the contraband for sale. The incident was on 30.4.1999, about 8 years back and none of the bottles were produced before the court. Considering all these aspects, this court is of the view that imposing a fine of Rs.5,000/= will meet the ends of justice and this Court will not propose to impose any penalty of imprisonment at this distance of time.

12. Accordingly, the appeal is partly allowed. The conviction and sentence awarded against the appellant under Section 55 (a) of the Abkari Act is set aside and he is acquitted of that charge, instead he is found guilty under Section 63 of the Act and sentenced to pay a fine of Rs.5,000/= with default sentence of payment of fine, to undergo S.I for three months. The bail bond executed by the appellant shall stand cancelled. It is further noted that there was an order for depositing an amount of Rs.12,500/= at the time of the admission of the appeal and, if any such amount was deposited, the fine imposed by this court shall be deducted from the said amount

and the balance amount shall be released to the appellant as per law.

K. THANKAPPAN, JUDGE.

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